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ALEXANDER L. STEVAS,
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No. 83-1444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCDERMOTT INCORPORATED, *et al.*,
Petitioners,

v.

EXXON CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari, or, in the Alternative, a Common Law Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Fifth Circuit abused its discretion by holding that the District Court's preliminary evidentiary ruling on petitioners' motion *in limine* more than fifteen months prior to trial did not raise a reviewable question under 28 U.S.C. § 1292(b) because the ruling merely restated the standards of the Federal Rules of Evidence and expressly reserved issues of relevance and potential undue prejudice.

2. Whether the District Court and the Fifth Circuit abused their discretion by refusing to rule that Fifth Amendment invocations by a party's officers and employees on deposition must always be excluded from evidence in a civil case as a matter of law and regardless of circumstances.

THE PARTIES BELOW

Respondents are plaintiffs in *In re Marine Construction Antitrust Litigation*, M.D.L. No. 417 (E.D. La.), which is still in discovery in the District Court, and were appellees in the United States Court of Appeals for the Fifth Circuit. Pursuant to Supreme Court Rule 28.1, the parents, affiliates, and subsidiaries (other than wholly-owned subsidiaries) of respondents are listed in an appendix hereto.

Respondents: American Independent Oil Company; American Natural Gas Production Company; American Petrofina Company of Texas; American Petrofina Exploration Company; Aminoil Development Inc.; Aminoil International Inc.; Aminoil U.S.A., Inc.; Amoco Egypt Oil Company; Amoco (U.K.) Exploration Company; Amoco Iran Oil Company; Amoco Norway Oil Company; Amoco Production Company; Amoco Trinidad Oil Company; Arabian American Oil Company; Aramco Overseas Company; Aramco Services Company; Arco British

Limited; Arco Exploration, Inc.; Arco Oil Producing, Inc.; Atlantic Richfield Company; Atlantic Richfield Indonesia, Inc.; BP Alaska, Inc.; The British Petroleum Company, Ltd.; BP Petroleum Development Ltd.; BP Trading Ltd.; Cabinda Gulf Oil Company; Caribbean Gulf Refining Corporation; Clark Oil Producing Company; Coastal Oil & Gas Corp.; Conoco Inc.; The Dow Chemical Company; Dow Chemical International, Ltd.; Drillamex, Inc.; El Paso Natural Gas Company; Esso Exploration & Production Australia, Inc.; Esso Production Malaysia, Inc.; Exxon Corporation; Exxon Pipeline Company; Farmland Industries, Inc.; Finadel, Inc.; Gas Producing Enterprises, Inc.; Herbert I. Goodman (trustee for Gulf Asian Terminals Inc.); Gulf Kuwait Company; Gulf (U.K.) Offshore Investments Ltd.; Gulf Oil Company (Nigeria) Ltd.; Gulf Oil Company of Gabon; Gulf Oil Corporation; Gulf Oil Terminals (Ireland) Ltd.; Gulf of Suez Petroleum Company; Gulf Refining Company; Louisiana Land Offshore Exploration Co., Inc.; Mene Grande Oil Company; Mineracao e Quimica do Nordeste, S.A.; Mobil Eugene Island Pipeline Company; Mobil G-C Corporation; Mobil Oil Exploration & Producing Southwest, Inc.; Mobil Oil Corporation; Norsk Hydro a.s.; Norsk Hydro Produksjon a.s.; The Northwestern Mutual Life Insurance Company; The Offshore Company; Pecten Cameroon; Pecten Malaysia Company; Petroleos Mexicanos; Phillips Petroleum Company; Phillips Petroleum Company, Norway; Shell Explorer Ltd.; Shell Oil Company; Shell Pipe Line Corporation; Signal Oil of Louisiana, Inc.; Sonat Exploration Company; Taranaki Offshore Petroleum Company, Ltd.; The Louisiana Land and Exploration Company; Wintershall Oil & Gas Company; Zaire Gulf Oil Company.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Fifth Circuit, which refused to permit on interlocutory appeal of a preliminary pretrial evidentiary ruling by the District Court.

OPINIONS BELOW

The orders and opinions of the District Court and the Court of Appeals are unreported and are set forth in Petitioners' Appendix at 1A-7A and 8A-9A.[1]

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[1] Citations to the opinions below will be to the Petitioners' Appendix as "Pet. App. ——."

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The provisions of Rules 401-403 of the Federal Rules of Evidences are set forth in an appendix hereto.[2]

RESTATEMENT OF THE CASE

The Prior Criminal Action

These cases, which have been consolidated for pretrial purposes before Judge Morey L. Sear in the Eastern District of Louisiana, have their origins in a criminal investigation of price fixing and collusive bidding in the marine construction industry. In 1978, petitioners Brown & Root, Inc., McDermott Incorporated (then known as J. Ray McDermott & Co., Inc.), and six of their principal officers were indicted and charged with felony violations of Section 1 of the Sherman Act and federal mail and wire fraud statutes. *United States* v. *J. Ray McDermott & Co., Inc.*, Criminal No. 78-422 (E.D. La. Dec. 14, 1978). The criminal defendants all pled *nolo contendere*. The corporate defendants each paid fines of $1 million, the statutory maximum; substantial fines and suspended criminal sentences were also imposed upon the individual defendants. During the course of the criminal proceeding, the government filed a Voluntary Bill of Particulars that described the formation and operation of the conspiracy and named 34 individuals as co-conspirators.

The Civil Actions

Consolidated actions on behalf of petitioners' customers were filed in the wake of the criminal proceeding. The complaints allege that beginning in the 1950s and continuing until at least the late 1970s, petitioners conspired to allocate marine construction projects between themselves, to submit collusive bids on marine construction projects, to fix prices, to standardize the terms and

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[2] 28 U.S.C. § 1292(b) appears at Pet. App. 18.

conditions on which they would perform marine construction services, and to monopolize the marine construction industry. Respondents also allege that petitioners fraudulently concealed their conspiracy.

Liability discovery commenced in February 1982 and ended on January 31, 1984, when the damage phase of discovery began. The District Court has scheduled trial for February 4, 1985.

Fifth Amendment Pleas

During liability discovery, respondents deposed 75 of petitioners' personnel. To date, 27 high ranking present and former officers and managers of petitioners—most of whom were either convicted or named as unindicted co-conspirators in the Voluntary Bill of Particulars in the criminal case—have invoked the Fifth Amendment and refused to answer deposition questions about the conspiracy.[3] The Fifth Amendment witnesses successfully opposed respondents' numerous motions to compel them to testify.

Respondents have been almost totally frustrated in their effort to obtain testimony about the conspiracy. Of the 34 persons named as co-conspirators in the government's Voluntary Bill of Particulars (including the six individual criminal defendants), 28 remained alive at the time of their depositions. Of that number, 23 named co-conspirators asserted the Fifth Amendment on deposition. Four co-conspirator witnesses testified about some knowledge of or participation in the conspiracy during a limited period of time, and one co-conspirator witness denied both knowledge of and participation in the conspir-

[3] In addition to the depositions that respondents have taken, petitioners have taken 385 depositions of respondents' personnel and 13 depositions of third-party witnesses. None of those witnesses has asserted the Fifth Amendment. Petitioners' reference to "500 depositions" (Pet. at 3) includes the enormous number of depositions they have taken.

acy. Thus, over 80 percent of the witnesses most likely to have knowledge relevant to these cases have asserted the Fifth Amendment.

Despite their protestations to the contrary, petitioners have done everything possible to insure that relevant information concerning the conspiracy is not disclosed, including assisting the Fifth Amendment deponents' opposition to respondents' motions to compel testimony, opposing respondents' motions for access to grand jury transcripts (despite a written agreement with the government not to oppose such motions),[4] opposing respondents' efforts to file interrogatories inquiring into the merits of these actions, and paying the legal fees of the Fifth Amendment deponents. Petitioners admit that they have done nothing to encourage testimony by their present and former employees. (Pet. at 11).

In fact, the record demonstrates that petitioners have encouraged their employees *not* to testify. At a hearing before the Louisiana Board of Registration for Professional Engineers and Land Surveyors on whether the engineering licenses of the individual defendants in the criminal case should be revoked, McDermott's General Counsel stated that he had advised McDermott officers not to testify before the Board:

> [B]ecause of the pendency of a great number of civil antitrust litigations against their company, in several of which litigations these gentlemen are named as co-defendants along with the company, *I have advised them that it would be most unwise and even prejudicial to their position in the civil litigation and to their position otherwise and possibly other litigations for them to engage in any explanation of the facts underlying the charges set forth in the indictments*, that is, the charges to which they pleaded nolo contendere [emphasis added.]

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[4] Letter agreements dated December 13, 1978, between U.S. Department of Justice and Denis McInerney, counsel for McDermott, and Richard Keeton, counsel for Brown & Root.

Counsel for one of the individual defendants in the criminal case advised the Board that Brown & Root would prefer that no one who is an officer of the company testify, and that it "would be nice if you really just *stonewall it* on the legal basis. . . ." [emphasis added]. These witnesses later asserted the Fifth Amendment at their depositions.

Contrary to petitioners' claim, respondents have not used the Fifth Amendment pleas to "manufacture evidence." (Pet. at 6). Respondents' questions to all the Fifth Amendment witnesses were based on substantial evidence implicating them in the conspiracy.[5]

The Rulings Below

At least fifteen months prior to trial, petitioners moved *in limine* to exclude any reference to their employees' Fifth Amendment pleas before the trier of fact, thereby raising for the first time in these cases the issue of admissibility of Fifth Amendment pleas. Respondents have never offered any Fifth Amendment pleas into evidence. The Magistrate initially granted petitioners' motion, but the district judge reversed:

> [Respondents'] motion for review of the Magistrate's order denying use of the claim of Fifth Amendment privilege is granted, and the Magis-

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[5] For example, Edward L. Tallichet, a Brown & Root Senior Group Vice President who pled *nolo contendere* in the criminal case, asserted the Fifth Amendment at his deposition. But Mr. Tallichet had earlier described the operation of petitioners' conspiracy in testimony before the Louisiana Board of Registration for Professional Engineers, saying "somewhere in the process they [Brown & Root and McDermott] started saying 'the next one [job] is yours and this one is ours and this one is yours.'" Similarly, Walter S. Gard, a former Brown & Root Senior Vice President and unindicted co-conspirator, refused to testify about a memorandum he wrote to one of his superiors that stated, "Have you made any preliminary shuffle of prospective work in 1970 as between ourselves and our competitors? We should be prepared with a proposal. Can we get a commitment to wash out newcomers?"

> trate's order is reversed. The *use of such evidence will be permitted upon a showing that the evidence is relevant and its probative value substantially outweighs the dangers of unfair prejudice, confusion of the issues and is not misleading to the jury.* [Pet. App. 9A (emphasis added).]

Although the District Court initially refused to certify this ruling for interlocutory appeal under 28 U.S.C. § 1292(b), it later granted petitioners' request for certification. However, the order did not comply with the statutory requirements of Section 1292(b). (Pet. App. 8A).

The Fifth Circuit denied leave to appeal. Citing prior Fifth Circuit precedents, the court concluded that the District Court's failure to recite the prerequisites of Section 1292(b) precluded review.[6] However, because the District Court could cure the inadequate certificate, Judges Rubin, Jolly, and Davis also considered whether the issue of the admissibility of Fifth Amendment pleas was a controlling question of law that should be subject to interlocutory review. They unanimously held that it was not.

The court emphasized that "The district court has not finally decided that any evidence will be admitted or excluded. He has simply decided that some evidence of this kind may be admitted after the trial court balances probative value against prejudice as required by Rule 403, Fed. R. Evid." (Pet. App. 6A). The supposedly "controlling question" that petitioners attempted to raise in the Fifth Circuit was held not to be controlling at all:

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[6] Fifth Circuit precedents preclude interlocutory appeal unless the District Court "has certified in writing that the criteria for appealability of an interlocutory order are met." Association of Co-Op Members v. Farmland Industries, 684 F.2d 1184, 1187-88 n.3 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1428 (1983). While the Fifth Circuit could have denied review on this ground alone (Pet. App. 5A), it nonetheless considered the appeal as though it had been properly certified (*id.*).

"its answer would require a *broad advisory opinion* rather than a specific reply to a specific legal question." (*Id.* at 7A (emphasis added)). The Fifth Circuit noted that:

> There is nothing in the record to indicate which questions and responses concerning fifth amendment pleas, if any, the trial court proposes to admit at trial or how it will evaluate their probative value against unfair prejudice, or how it will instruct the jury concerning the jury's consideration of any answer that might be allowed. [*Id.*]

Because the court was unwilling to hold that Fifth Amendment pleas are never admissible, it found that admissibility could be determined only by considering specific facts involving each witness, which were not in the record. (*Id.*) Thus, the Fifth Circuit concluded that it was premature to resolve the question of the admissibility of Fifth Amendment pleas. Petitioners now seek review by this Court.

ARGUMENT

These are at least two reasons why the Court should deny certiorari. First, petitioners are seeking an interlocutory advisory opinion in the absence of a clear and complete record. Second, since the District Court's order is consistent with all relevant precedents, including an opinion of this Court, there is no likelihood that the Court would reverse the rulings below.

I. THE PETITION SEEKS AN INTERLOCUTORY ADVISORY OPINION ON AN INCOMPLETE RECORD.

Petitioners seek interlocutory review of a District Court pretrial evidentiary ruling, made in an abstract setting, without a trial record. The District Court order did not resolve anything. As the Fifth Circuit stated, "The district court has not finally decided that any evidence will be admitted or excluded." (Pet. App. 6A). The District Court did not conclude that Fifth Amendment

pleas would be relevant or that their probative value will substantially outweigh any possible prejudice. On the contrary, the court expressly reserved the issues of relevance and possible undue prejudice. (Pet. App. 9A). If the trial court ultimately concludes that the evidence is not relevant, it will be excluded. And if the court finds that petitioners would be unduly prejudiced by its admission, it will be excluded. Petitioners remain free to argue those issues at trial and later on appeal.

As the Fifth Circuit recognized, the District Court order merely restated the admissibility standards of the Federal Rules of Evidence. (Pet. App. 6A). Under Rules 401-403, evidence is admissible only if it is relevant and not unduly prejudicial. The District Court has not yet resolved either issue under Rules 401-403.

The Fifth Circuit quite properly refused to exercise its broad discretion under 28 U.S.C. § 1292(b) merely to render a "broad advisory opinion". (Pet. App. 6A). Petitioners now ask this Court to decide an abstract question in a factual vacuum. As the Fifth Circuit noted, there is nothing in the record to indicate what use respondents may seek to make of the Fifth Amendment at trial, which witnesses' Fifth Amendment pleas, if any, will be admitted into evidence at trial, or how the District Court will instruct the jury concerning any evidence that might be admitted. (Pet. App. 7A). The District Court order addressed none of those issues. Thus, this Court is being asked to issue an interlocutory ruling on a complex question without an adequate record. That alone is a sufficient basis for denying certiorari.

The Court should be reluctant to address the complex question raised by the petition in the procedural posture presented here. Petitioners seek an absolute ruling that non-party Fifth Amendment pleas are never admissible in a civil action, regardless of the circumstances of the case or the relationship between the witness and a party.

(Pet. at 6-7).[7] However, if the Court concludes that Fifth Amendment "evidence is admissible only under certain conditions, admissibility could not be determined without considering each set of conditions on its specific facts."[8] (Pet. App. 7A). The Fifth Circuit was properly unwilling to resolve such questions without knowing more about the circumstances of the case, including whether the witnesses are truly distinterested third-parties or agents of the petitioners. (Pet. App. 6A & n.3). Unless this Court is prepared to formulate an absolute rule, which would be contrary to the existing precedents, any decision it makes will necessarily be limited to the unique facts of this case.

II. THE RULINGS BELOW WERE CORRECT.

Petitioners seek a ruling that Fifth Amendment pleas by a party's officers and employees are never admissible into evidence at a civil trial under any circumstances. Both the District Court and the Fifth Circuit refused to so hold. The decisions of both lower courts are consistent with *all* of the relevant precedents, including an opinion of this Court and recent decisions by both the Second Circuit and the Fifth Circuit. There is no conflict among the circuits in this case, and no likelihood that this Court will reach a different result.

Although the rule in *criminal* cases is that no adverse inference can be drawn when a witness asserts the Fifth Amendment privilege, it is well settled that evidence of a witness' refusal to testify on Fifth Amendment grounds is relevant and admissible in a *civil* pro-

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[7] Petitioners never sought such a ruling as a matter of law in either the District Court or the Fifth Circuit.

[8] Even the principal authority cited by petitioners, Judge Stern's separate opinion in Lionti v. Lloyds Ins. Co., 709 F.2d 237, 244 (3d Cir.), *cert. denied*, 104 S. Ct. 490 (1983), would require a determination whether Fifth Amendment witnesses are controlled by parties, a determination that cannot be made on the record before this Court.

ceeding, and that the finder of fact may draw inferences from such refusals to testify. This Court so held in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), where a prison inmate's refusal to testify on Fifth Amendment grounds was considered against him, along with other evidence, in a civil prison disciplinary proceeding. The Court upheld consideration of the Fifth Amendment invocation as evidence, stating:

> Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a *party to a civil cause*." 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961). [425 U.S. at 318 (emphasis in original).]

The Court explained its holding as follows:

> [The Fifth Amendment] has little to do with a fair trial and derogates rather than improves the chances for accurate decisions. Thus, aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause. Indeed, as Mr. Justice Brandeis declared . . . "Silence is often evidence of the most persuasive character." [*Id.* at 319 (citations omitted).]

Later, in *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977), the Court explained that *Baxter* permits "an inference to be drawn in a civil case from a party's refusal to testify." There can be no question that the *Baxter* rule of admissibility applies to this civil action.

Since *Baxter*, the lower courts have consistently admitted Fifth Amendment invocations in civil cases. For instance, in *National Acceptance Co. v. Bathalter*, 705 F.2d 924, 929-30 (7th Cir. 1983), the court wrote:

> After *Baxter* there is no longer any doubt that at trial a civil defendant's silence may be used against him, even if the silence is an exercise of his constitutional privilege against self-incrimination. Thus, if this case were to go to trial, [National Acceptance Company] would be entitled to the benefit of an adverse inference against Bathalter if he declined to answer a question and invoked his Fifth Amendment privilege, although *Baxter* does not hold that an adverse finding could properly rest on the silence, without other evidence.

Similarly, in *Wehling v. Columbia Broadcasting System*, 611 F.2d 1026 (5th Cir. 1980), the Fifth Circuit, citing *Baxter*, held that a defendant was entitled to rely on an adverse inference from plaintiff Wehling's Fifth Amendment plea:

> Although Wehling could continue to assert his Fifth Amendment rights at trial, it is clear that *his invocation of the privilege would be subject to the drawing of an adverse inference by the trier of fact.* [*Id.* at 1027 (emphasis added).]

Accord, e.g., McKinney v. Galvin, 701 F.2d 584, 589 n.10 (6th Cir. 1983); *Oak Systems of Chicago v. Fiddlers, Inc.*, No. 81-C-6901 (N.D. Ill. Feb. 22, 1984); *SEC v. Musella*, 1984 Fed. Sec. L. Rep. (CCH) ¶ 99,637 (S.D.N.Y. 1984).

The Fifth Circuit's recent decision in *Farace v. Independent Fire Ins. Co.*, 699 F.2d 204 (5th Cir. 1983), is also consistent with *Baxter*. In *Farace*, the court wrote that "even the dissent in *Baxter* recognized that such an [adverse] inference is permissible in civil litigation between private parties." *Id.* at 210. Citing a recent Yale Law Journal article,[9] the court noted that there

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[9] Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062 (1982). The Fifth Circuit also cited the same article in its opinion in this case. (Pet. App. 6A n.3).

is no constitutional ground for exclusion of Fifth Amendment pleas in civil cases. *Id.* *All* reported cases decided since *Baxter*, and one case preceding *Baxter*, have held that in civil cases Fifth Amendment claims by present or former employees of parties may be considered by the trier of fact, which may draw adverse inferences against the party-employer.[10]

In its very recent decision in *Brink's Inc. v. City of New York*, the Second Circuit affirmed Judge Weinfeld's decision to admit the deposition Fifth Amendment pleas of Brink's employees who stole the City's parking meter revenues. Writing for the Second Circuit, Judge Oakes noted the distinction between the Fifth Amendment issue in civil and criminal cases. 717 F.2d at 709. Citing *Baxter*, the court agreed that the self-incrimination claims were relevant: 'the employees' claims of privilege were admissible and competent evidence under the circumstances of this case, given the fact there is no constitutional mandate . . . against their admission." *Id.* at 710 (citation omitted). The court emphasized that determinations of prejudice are within the discretion of the trial court. *Id.* It concluded that the Fifth Amendment pleas were not inflammatory, but merely supported the City's position, and thus admission of such evidence was not unduly prejudicial. *Id.* Petitioners' only answer to *Brink's* is to embrace the dissent. (Pet. at 12).

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[10] *See* Brink's Inc. v. City of New York, 717 F.2d 700, 707-10 (2d Cir. 1983) (rehearing denied Oct. 19, 1983); United States v. Mammoth Oil Co., 14 F.2d 705, 729-30 (8th Cir. 1926), *aff'd*, 275 U.S. 13 (1927); Compass Ins. Co. v. Acella Chrysler-Plymouth, Inc., No. 80 Civ. 5608 (HFW) (S.D.N.Y. July 25, 1983); Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 1983-1 Trade Cas. (CCH) ¶ 65,332 (S.D.N.Y. 1983); E. H. Boerth Co. v. LAD Properties, 82 F.R.D. 635, 644-45 (D. Minn. 1979); Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart Inc., 465 F. Supp. 585, 591 (M.D. La. 1979). *See also* Little Rock School District v. Borden, Inc., No. LR-76-C-41 (E.D. Ark. Dec. 12, 1980); In re Corrugated Container Antitrust Litigation, M.D.L. Docket No. 310, Pretrial Order 51 (S.D. Tex. May 23, 1980).

None of the cases petitioners cite is contrary authority. The court in *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 243 n.10 (3d Cir.), *cert. denied*, 104 S. Ct. 490 (1983), expressly declined to reach this question; only Judge Stern discussed it in a separate opinion. *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983), never addressed the admissibility of Fifth Amendment pleas. The issue in *Pillsbury* was whether witnesses who had given immunized grand jury testimony should be compelled, over Fifth Amendment pleas, to answer deposition questions that "tracked" their grand jury testimony. In short, no case has ever held as petitioners ask this Court to hold. All authority is contrary to their position.

All of the Fifth Amendment witnesses in these cases are present or former trusted high-level officers or management employees of petitioners. Their conduct undertaken within the scope of their employment was the conduct of petitioners since a corporation can act only through its employees and agents. In their business affairs, petitioners spoke, acted, or failed to act through these witnesses. If petitioners chose to testify at trial about the conspiracy, they would do so through the testimony of the Fifth Amendment witnesses.

The deposition questions put to the Fifth Amendment witnesses concerned their knowledge of and participation in a price-fixing conspiracy involving and benefiting their employers. Unquestionably, if these witnesses had testified as to their knowledge of the conspiracy, their testimony would be admissible against their employers, Brown & Root and McDermott. The courts have properly determined that corporate parties in *civil* litigation cannot hide behind the Fifth Amendment pleas of their employees.

CONCLUSION

As this Court recently stated, "even if the District Judge certifies the order under § 1292(b), the appellant still 'has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after entry of a final judgment.' The appellate court may deny the appeal for any reason, including docket congestion." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (citation omitted). Petitioners failed to persuade the Fifth Circuit that there were any "exceptional circumstances" here, and it therefore denied review. Petitioners have not met their heavy burden of showing why this Court should review an abstract interlocutory ruling.

Petitioners seek a decision by this Court that the Fifth Amendment pleas of a party's officers and employees are never admissible in civil cases under any circumstances. Even if relevant precedents did not hold to the contrary, this Court should not consider making such a decision in the absence of a concrete offer of proof in an actual trial setting.

For the reasons stated herein, certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The pertinent portions of the Federal Rules of Evidence provide:

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

APPENDIX B

PARENTS, AFFILIATES AND SUBSIDIARIES OF RESPONDENTS

AMERICAN NATURAL GAS PRODUCTION CO.

Parent Company: American Natural Resources Company

Subsidiaries and affiliates (not wholly owned):

Trans Canada Pipeline Company Ltd.
ANR Pipeline Company

AMERICAN PETROFINA COMPANY OF TEXAS

Petrofina, S. A.
Finachem International Company Limited
American Petrofina Holding Company
Finacor, Inc.
Petrobelge
American Petrofina of Italy, S.p.A.
Finacoal, Inc.
American Petrofina Exploration Company
American Petrofina Exploration Company of Norway
Finaterre Inc.
Petrofina Delaware, Incorporated
APCOT-Finadel Joint Venture
Finachem, U. S.
Finadel Pipe Line Company
American Petrofina, Incorporated
Fina Supply Inc.
American Petrofina Marketing Inc.
Petrofina—U.S. Incorporated
Coe-Mar, Incorporated
Cosden Oil & Chemical Company
Viny Limited
Fina United Corporation
River Pipeline Company

The Pit Stop, Inc.
Finaserve, Inc.
Hercofina Europe
Cosden Technology, Inc.
Trust Pipe Line Company
S & S Gas Mart, Inc.
Porta Fina Oil Company
Hercofina
American Petrofina of Venezuela, S.A.
Cosden International Sales Corporation
Fast Track, Inc.
Hercofina (Delaware)
Cosden Pipe Line Company
Emejota Engineering Corp.
Comanche Springs Fuel Center, Inc.
Inco Oil Company
American Petrofina Pipe Line Company
Sitma Coatings, Inc.
Vercon Inc.
Petro-Phenix, Inc.
Petcon, Incorporated
Capitol Fina Pipe Line Company
Mid-County Chemical Company
Cosden, Inc.
Dal-Fin, Inc.
Maxi-Serve, Inc.
Fin-Tex Pipe Line Company
The K-T Oil Company
Cos-Mar, Company
Toby, Incorporated
Gulf Coast Data Fleet, Inc.
The American Petrofina Foundation
Petro-Mark, Inc.
Fin-Oil, Inc.
Carville Properties, Inc.

AMINOIL INC.

Parent Company: R. J. Reynolds Industries, Inc.

Subsidiaries and affiliates (not wholly owned):

Long Beach Oil Development Co.
Solar Gas, Inc.
Iranian Oil Services Holdings Ltd.
Pars Investment Corp.
Iranian Oil Participants Ltd.
Iricon Agency Ltd.
Minas y Petroleos del Ecuador
Petrolera Yusani S.A.
Central African Petroleum Refineries Ltd.

AMOCO PRODUCTION COMPANY

(Limited to entities with stock or debt securities publicly traded in the United States or Canada)

Parent Company: Amoco Production Company is a wholly-owned subsidiary of Standard Oil Company (Indiana).

Subsidiaries and affiliates (not wholly owned):

Amoco Australia Limited
Amoco Canada Petroleum Company, Ltd.
Amoco Credit Corporation
Amoco Oil Holdings S.A.
Amoco (U.K.) Exploration Company
Analog Devices Inc.
Cetus Corporation
Cyprus Mines Corporation

ATLANTIC RICHFIELD COMPANY

Alpart Farms (Jamaica) Ltd.
Alumina Contractors Limited
Alumina Partners of Jamaica
Alyeska Pipeline Service Company

The Ambler Mining Company
Anaconda Exploration New Zealand Limited
Anaconda Holdings Do Brasil LTDA
Anaflex S.A. de C.V.
Anamax Mining Company
ARCO Australia Coal Pty. Ltd.
ARCO Solar Nigeria Ltd.
Arilan, S.A. de C.V.
Arpet Petroleum Limited
A/S Skaland Grafitiverk
Atlantic Richfield de Mexico, S.A. de D.V.
Aughnish Alumina Limited
Aughinish Estates Limited
Aughinish Finance Limited
Aughinish Property (Nominees) Limited
Badger Pipeline Company
Bingham Development Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
The British American Metals Company, Limited
Candel International Limited
Caribou-Chaleur Bay Mines Ltd.
Caribou-Smith Mines Ltd.
Centroamericana de Cobre, S.A.
Chile Copper Company
Cobre de Hercules, S.A.
Cobre de Mexico, S.A.
Cobrecel, S.A. de C.V.
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Compania Minera Dos Republicas, S.A. de C.V.
Compania Minera Kappa, S.A.
Compania Minera Penacobre, S.A.
Cook Inlet Pipe Line Company
Cupro San Louis, S.A. de C.V.
Curragh Coal Sales
Delaware Bay Transportation Company
Dexter de Mexico, S.A.

Dixie Pipeline Company
East Texas Salt Water Disposal Co.
85819 Canada Limited
Eisenhower Mining Company
Empresa de Comercio Exterior Mexicano, S.A. de C.V.
Energy Transportation Systems, Inc.
Ericsson, Inc.
Flower Street Limited
F.T.L. Company Limited
Gravity Adjustment, Inc.
Greater Pacific Limited
Griffith-Consumers Company
Hardy Oil Company
Imperial Eastman de Mexico, S.A.
Impulsora De Cobre, S.A. de C.V.
Industrias Nacobre, S.A. de C.V.
Industria Tecnos, S.A. de C.V.
Iricon Agency Ltd.
Jamaica Alumina Security Company, Ltd.
Kenai Pipe Line Company
Kronos, Computacion y Teleproceso, S.A. de C.V.
Kuparuk Transportation Capital Corporation
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Lavan Petroleum Co.
Lingobronce, S.A.
Manguera Flex, S.A. de C.V.
Manufacturera Mexicana De Partes Para Automoviles, S.A. de C.V.
Mayflower Mining Company
R.W. Miller (Holdings) Limited
Minera Anaconda Limitada
Montoro, Empresa Para La Industria Quimica Nacional de Cobre, S.A.
New Bingham Mary Mining Company
Nihon Oxirane Company, Ltd.
Nordisk Mineselskab, A.S.
Oil Shipper Service, Inc.
P.T. Arutmin Indonesia

Park City Ventures
Park Cummings Mining Company
Park Premier Mining Company
Participaciones Mexicanas, S.A. de C.V.
Platte Pipe Line Company
Prince Consolidated Mining Company
Productos Especiales Metalicos, S.A.
Richfield U.K. Petroleum, Limited
Rodman, Inc.
The Saudi Cable Company
Servicios Industriales Nacobre, S.A.
Sinclair U.K. Oil Company Limited
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Sociedada Anonima Marvin
Solar Energy Center (E.C.)
Solvamex, S.A. de C.V.
Sumiarco Company Limited
Swecomex, S.A.
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company
Tubos Flexibles, S.A.
Union de Credito Industrial Vallejo, S.A.
United Park City Mines Company
The Walworth Company
West Mayflower Mining Company
William Prym de Mexico, S.A.

BRITISH PETROLEUM COMPANY, LTD.

Standard Oil Company (Ohio)
AMAX Inc.

COASTAL OIL AND GAS CORP.

Parent Company: The Coastal Corporation

Subsidiaries and affiliates (not wholly owned):

Colorado Interstate Corporation
Colorado Interstate Gas

CONOCO INC.

(Limited to entities with stock or debt securities publicly traded in the United States or Canada)

Parent Company: Conoco Inc. is a wholly-owned subsidiary of Conoco Delaware, Inc., which is a wholly-owned subsidiary of E. I. Dupont de Nemours and Company.

Subsidiaries and affiliates (not wholly-owned):

Big Sky of Montana Realty, Inc.
Cit-Con Oil Corporation
Conch International Methane Ltd.
Conch L.N.G.
Conoco Exploration, Ltd.
Bishop Coal Company
Conrhein Coal Co.
Cardinal River Coals, Ltd.
Neptune Bulk Terminals (Canada) Ltd.
Contochu Inc.
Harmar Coal Co.
Itmann Coal Co.
Mathies Coal Co.
Tongue River Railroad
Oasis Oil Co. of Libya, Inc.
Colonial Pipeline Company
Dixie Pipeline Company
Explorer Pipoline Company
Lake Charles Pipe Line Company
Pioneer Pipe Line Company
Platte Pipe Line Company
Seadock, Inc.
Seaway Pipeline, Inc.
Texas Offshore Port, Inc.
West Shore Pipe Line Company
Yellowstone Pipe Line Company
Felix Oil Company
Jupiter Chemical Inc.
Long Beach Oil Development Company

Kettleman North Dome Assoc.
Maritime Protection Inc.
Oil Shippers Service, Inc.
Petroleum Terminals, Inc.
Iricon Agency, Ltd.
Southern Facilities, Inc.
The Standard Shale Products Company
Tidelands Royalty Trust
Airport Limited Partnership
Concord Limited Partnership
Du Pont Canada Inc.
PD Glycol Limited
Syngas Company
Wilmington Trust Company

THE DOW CHEMICAL COMPANY

Alamo Land Co.
Dow-Corning Corp.
Cordis Dow Corp.
J V Chemicals

DRILLAMEX, INC.

Parent Company: American Express Co.

EL PASO NATURAL GAS COMPANY

Parent Company: The El Paso Company

EXXON CORPORATION

(Limited to entities with stock or debt securities publicly traded in the United States or Canada)

Exxon Finance N.V.
Exxon Pipeline Company
Exxon Shipping Company
Imperial Oil Limited
Intecom, Inc.
Reliance Electric Company
Supertex, Inc.

GULF OIL CORPORATION

Parent Company: Gulf Corporation

Subsidiaries and affiliates (not wholly-owned):

A/S Jargul
A/S Jargul & Co. K/S
Allied General Nuclear Services
Asia Polymer Corp.
Bio Research Center Company Limited
Britamco Ltd.
Cayman Kewanee, Ltd.
Chicago Wire Goods Co.—H/FP
China Gulf Oil Company Limited
Colonial Pipeline Company
Componentes Industriales Mexicandes, S.A.
Delaware Bay Transportation Company
Dixie Pipeline Company
Electronic Marketing Systems Inc.
Emery Joint Venture
The G.S. Equipment and General Supply Company—H/FP
General Atomic Europe Development Corporation
Gulf Canada Limited
Gulf Oil Financial Corporation
Gulf Oil Realty Company
Gulf Oil Zaire S.A.R.L.
Harshaw—Juarez S.A. De C.V.—H/FP
Harshaw Chemical of Canada, Ltd.—H/FP
Harshaw Chemicals Limited—H/FP
Harshaw Chemie B.V.—H/FP
Harshaw Chemie G.M.B.H.—H/FP
Harshaw Galvanotecnia S.A.—H/FP
Harshaw Holland N.V.—H/FP
Harshaw International Corporation—Disc—H/FP
Harshaw Nuclear Electronics, Inc.—H/FP
Harshaw-Bryce & Co. Pty. Ltd.—H/FP
Harshaw-Murata Kabushiki Kaisha—H/FP
Harshaw-Filtrol Partnership—H/FP

Hochtemperatur-Reactorbau GMBH
Hong Kong Refueling Company Ltd.
Industrial Nickel, Inc.—H/FP
Insco Holding & Finance Company N.V.
Insco Limited
Kayeye Insurance Company, Ltd.
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Lancer Chemical Corporation—H/FP Name Holder
Laurel Pipe Line Company
Mid-Valley Pipeline Company
Midwest Carbide Corporation
North River Energy Company
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company
Paloma Pipe Line Company
Pembroke Capital Company
Pembroke Cracking Company
Plastigama, S.A.
Platte Pipeline Company
Produtos Quimicos Somox, Ltda.—H/FP
Raffinerie De Cressier S.A.
Rio Blanco Oil Shale Partnership
Sarni S.P.A.—Refining
Solvent Refined Coal International, Inc.
Stibium, Inc.—H/FP
Sunrise International Company Limited
Taita Chemical Corporation
Transinsco Inc.
Transocean Group, Inc.
Valley Pines Associates
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company
Gulf Pipeline Company (formerly Gulf Refining Company)
Cabinda Gulf Oil Company
Gulf Oil Company of Gabon
Zaire Gulf Oil Company

Gulf Oil Zaire S.A.R.L.
Gulf Oil Company (Nigeria) Limited
Transocean Gulf Oil Company
Mene Grande Oil Company
Caribbean Gulf Refining Corporation
Gulf (U.K.) Offshore Investments Limited
Gulf Oil Terminals (Ireland) Limited
Kupan International Company
Gulf Oil Trading Investments Limited
Gulf Oil Trading Company, Limited
Gulf Kuwait Company
Herbert I. Goodman, Trustee for Gulf Asian Terminals, Inc.

THE LOUISIANA LAND AND EXPLORATION COMPANY

Copper Range Company
Smokey Valley Mining Company
Kalua Koi
Kapuhi Partnership

MOBIL OIL CORPORATION

(Limited to entities with stock or debt securities publicly traded in the United States or Canada)

Mobil Alaska Pipeline Company

NORSK HYDRO A.S.

Heger Plastics A/S
A/S Mowi
Roldal-Suldal Kraft A/S
Vefi A/S
Hydro Thai Limited
A/S Korn og Foderstof Kompagniet
A/S Korn-og Godningsforretningen af 1.10.1970
Norsk Hydro Danmark a.s
Norsk Hydro (M) Sdn. Bhd.

Diamond Fertilizer and Chemical Co. Ltd.
Scanitro Ltd.
Norala AG
Skogens Godslings AB
Supra AB
Transnitro, Inc.
Sameiet Alkali
I/S Felleslager
Hydrokem I/S
I/S Noretyl
I/S Norpolefin
I/S Pallebater
Rafinor A/S & Co.
I/S Roldal-Suldal Kraft
I/S Skafsa Kraftverk
I/S Sundsfjord Kraftlag
Dansk Norsk Kvaelstoffabrik I/S

THE NORTHWESTERN
MUTUAL LIFE INSURANCE CO.

The Regis Group, Inc.
Genesis Project N.V. & Subs., Inc.
Capitol Court Corp.
Evans Food Products Company
Teleco, Inc.
First Mortgage Company of Texas, Inc.
Futura Gear Works, Inc.
Weingarten Properties, Inc.
All-Pro Broadcasting, Inc.
Genesis Project N.V. & Subs., Inc.

PHILLIPS PETROLEUM COMPANY

Aero Oil Company
Phillips Pacific Chemical Company
The Salk Institute Biotechnology/Industrial Assoc., Inc.
Bruin Carbon Dioxide Sales Corporation
Canyon Reef Carriers Inc.

Kenai LNG Corporation
Phillips Gas Supply Corporation
White River Shale Oil Corporation
Alyeska Pipeline Service Company
Chisholm Pipeline Company
Colonial Pipeline Company
Dixie Pipeline Company
Everglades Pipe Line Company
Explorer Pipeline Company
Kaw Pipe Line Company
Powder River Corporation
Seadock, Inc.
Seaway Pipeline Inc.
Texas Offshore Port, Inc.
Papago Chemicals, Inc.
Transatlantic Reinsurance Company
LeeFac, Inc.
Acurex Corporation

Phillips Petroleum Company Norway

Parent Company: Phillips Petroleum International Investment Company

SHELL OIL COMPANY

Quazite Corporation
First Harlem Securities Corporation
Fractionation Research
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
LOOP, Inc.
MESBIC Financial Corporation of Houston
Oil Companies Institute for Marine Pollution Compensation
Oil Insurance Limited
Pioneer Equipment Co.
Seadock, Inc.

Shell Mining Company
Shell Western E&P Inc.

Shell Energy Resources

Shell Mining Company
Shell Western E&P Inc.

Pecten International Company

Pecten Cameroon Company

Shell Western E&P Inc.

East Texas Salt Water Disposal Company
Grand Ecallie Land Company, Inc.
Van Salt Water Disposal Company
WIDC (Wyoming Industrial Development Corporation)

Quazite Corporation

Plastibeton, Inc.

Shell Pipe Line Corporation

Butte Pipe Line Company
Dixie Pipeline Company
Explorer Pipeline Company
LOCAP, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company